

No. 12937

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United States  
Court of Appeals  
for the Ninth Circuit.

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MARYLAND CASUALTY COMPANY, a Corporation,

Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
for the District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

CAKE, JAUREGUY & TOOZE,  
DWIGHT L. SCHWAB,  
DENTON G. BURDICK, JR., and  
LAMAR TOOZE, JR.,

Equitable Building,  
Portland, Oregon,

Attorneys for Appellant.

SENN, RECKEN & RECKEN, and  
L. A. RECKEN,

Public Service Building,  
Portland, Oregon,

Attorneys for Appellee.





In the District Court of the United States  
for the District of Oregon

No. Civ. 5419

MARYLAND CASUALTY COMPANY, a Cor-  
poration,

Plaintiff,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Defendants.

### COMPLAINT

Comes Now the plaintiff and for its cause of  
action against the above-named defendants Com-  
plains and Alleges as follows:

#### I.

At all times herein mentioned plaintiff was and  
is a corporation incorporated under the laws of the  
State of Maryland and is duly qualified, empowered  
and admitted to engage in the insurance business  
in the states of California and Oregon, and is so  
engaged; and was and is duly authorized to write  
workmen's compensation insurance in the State of  
California to insure employers against liability for  
workmen's compensation and was and is so en-  
gaged; and the defendants, Sidney F. Paton and  
Lois Eleanor Paton, are citizens of the State of

California doing business as co-partners under the assumed name and style of Paramount Service. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

On or about the 16th day of September, 1947, one James Buie was employed by one James T. Moore, doing business as the Quaker Pacific Rubber Company, under a contract of employment made in the State of California between the said James Buie and said James T. Moore.

## III.

The functions and duties of the said James Buie under the said contract of employment were those of a traveling salesman operating within the State of Oregon.

## IV.

The defendants Sidney F. Paton and Lois Eleanor Paton are residents and citizens of the State of California, and are co-partners doing business as, and under the assumed name and style of, Paramount Service. The said defendants, did, within the State of Oregon, employ one or more persons, conduct business operations and maintain business facilities; and more particularly did own a 1942 G.M.C. motor truck bearing 1947 Oregon license plate number T3937 and did operate said motor truck by and through their employee and agent, one Lucius W. Hereford, upon the highways

of the State of Oregon at and prior to the time of the accident more particularly described hereinafter.

## V.

During all times herein mentioned that highway commonly known as the "Lower Columbia River Highway" extended and now extends in a general easterly and westerly direction between the cities of Astoria and Portland, in the State of Oregon; that said highway is a part of the Oregon State Highway system and is in general use for public and private vehicular travel; that said highway is a duly dedicated public highway, and is in excess of 21 feet in width and is paved and is divided into two lanes of traffic by means of a painted stripe or line in the center of the said highway, the north lane being intended for west-bound traffic and the south lane for east-bound traffic.

## VI.

While acting in and pursuant to the scope and course of his employment by the said Quaker Pacific Rubber Company and in direct performance of his duties as such employee, the said James Buie was, on or about the 2nd day of October, 1947, at about the hour of 11:30 o'clock a.m. of said day, driving and operating a motor vehicle in a westerly direction on and along the said "Lower Columbia River Highway"; and the said James Buie had driven to and reached a point on said Highway about four miles northwesterly of the town of

Rainier, Columbia County, Oregon, at which time and place the said Lucius W. Hereford, driving defendants' said 1942 G.M.C. motor truck in an easterly direction along and upon the said Lower Columbia River Highway in the course and scope of his, the said Hereford's employment, negligently drove the said motor truck across said center line and into the lane for west-bound traffic then occupied by the motor vehicle being driven by the said James Buie, and into and against the vehicle operated and occupied by the said James Buie, and the said James Buie then and there suffered injuries to his person from which, as a direct and proximate result thereof, he died on the said 2nd day of October, 1947.

## VII.

That the direct and proximate cause of the fatal injuries thus sustained by the said James Buie was the carelessness, recklessness and negligence of the defendants, acting by and through their duly appointed and acting employee and agent, namely, the said Lucius W. Hereford, in the following particulars, to wit:

(a) That the said Lucius W. Hereford failed to operate and drive the said 1942 G.M.C. motor truck upon the right or south side of the said center line of said two-lane Lower Columbia River Highway while the same was available for travel.

(b) That the said Lucius W. Hereford failed to operate and drive said 1942 GMC

motor truck to the right side of the center line of the said highway and give at least one-half of the main-travelled portion thereof to the approaching automobile then and there being driven and operated by the said James Buie.

(c) In driving and operating said 1942 GMC motor truck out of the right lane and into the left lane of traffic without first ascertaining that such movement could be made with safety and without endangering other members of the travelling public and particularly the approaching automobile then being operated by the said James Buie.

(d) In failing to keep a proper or any lookout to ascertain the presence of automobiles approaching from the opposite direction, and particularly for the automobile then being operated by the said James Buie.

(e) At said time and place in failing to have or keep the said 1942 GMC motor truck under proper or any control so as to be able to control and properly guide or direct the said 1942 GMC motor truck and to stop the same within a reasonable space of time and distance.

(f) In operating said 1942 GMC motor truck at said time and place at a greater speed than was reasonable and prudent having due regard to visibility, traffic, surface, contour and width of said highway at the point of the said collision and the hazard and other conditions then and there existing and at a rate than was



greater than would permit him to exercise proper control of said 1942 GMC motor truck and to decrease the speed and to stop the same in order to avoid a collision with the automobile then being operated by the said James Buie.

(g) In failing to yield or give the right of way to the said automobile which was then being operated by the said James Buie, which was at said time and place being operated in the right hand lane designated for traffic proceeding in a general westerly direction.

### VIII.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, enacted by the Legislature of said State and duly approved by the Governor thereof:

Section 111 of the Labor Code of the State of California provides in part as follows, to wit:

“The Industrial Accident Commission, consisting of seven members, shall exercise all judicial powers, including those vested in it under Sections 4903, 5301, and 5307 of this code.”

Section 114 of the Labor Code of the State of California provides as follows, to wit:

“The commission shall be composed of two panels of three members each. The members shall be assigned to the panels by the chairman

and may be transferred from one panel to another by the chairman to facilitate the work of the commission. The chairman may act in the place of any member of a panel who is absent, or whose office has become vacant."

\* \* \*

"Except as otherwise expressly provided, each of the panels shall have the power to hear and determine matters within the jurisdiction of the commission. The commission shall by rule provide for a geographical division of the State to determine what matters are to be heard and decided by each panel. Particular matters may be transferred from one panel to another, or to the commission as a whole, by an order signed by four members of the commission. In any case in which the commission acts as a whole, the act of four members shall be considered the act of the commission."

Section 133 of the Labor Code of the State of California provides as follows, to wit:

"The commission shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code."

Section 3204 of the Labor Code of the State of California provides as follows, to wit:

"Unless the context otherwise requires, the definitions hereinafter set forth in this chapter shall govern the construction and meaning of the terms and phrases used in this division."

Section 3211 of the Labor Code of the State of California provides as follows, to wit:

“ ‘Insurer’ includes the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or inter-insurance exchange authorized under the laws of this State to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued.”

Section 3501 of the Labor Code of the State of California provides in part as follows, to wit:

“The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury.”

Section 3600 of the Labor Code of the State of California provides as follows, to wit:

“Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

“(a) Where, at the time of the injury, both



the employer and the employee are subject to the compensation provisions of this division.

“(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

“(c) Where the injury is proximately caused by the employment, either with or without negligence.

“(d) Where the injury is not caused by the intoxication of the injured employee.

“(e) Where the injury is not intentionally self-inflicted.”

Section 3700 of the Labor Code of the State of California provides in part as follows, to wit:

“Every employer except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

“(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this State.”

Section 4701 of the Labor Code of the State of California provides as follows, to wit:

“Where an injury causes death, either with or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for:

“(a) Reasonable expenses of the employee’s burial, not exceeding \$300.

“(b) A death benefit, to be allowed to the

dependents when the employee leaves any person dependent upon him for support.”

Section 4702 of the Labor Code of the State of California provides in part as follows, to wit:

“The death benefit shall be a sum sufficient to equal:

“(a) In a case of total dependency, four times the average annual earnings of the deceased employee.

\* \* \*

“The death benefit shall be paid in installments in the same manner and amounts as disability indemnity, payments to be made at least twice each calendar month, unless the commission otherwise orders. Except as provided in the next paragraph the death benefit, when added to all accrued disability indemnity, shall not exceed four times the average annual earnings of the employee, nor exceed the sum of six thousand dollars (\$6,000) except in the case of a surviving widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars (\$7,500) and except as otherwise provided in Sections 4553 and 4554. For a total dependency the minimum death benefit shall be three thousand dollars (\$3,000).”

Section 4703 of the Labor Code of the State of California provides in part as follows, to wit:

“Subject to the provisions of section 4704,

this section shall determine the right to a death benefit.

“If there is any person wholly dependent for support upon a deceased employee, such person shall receive the entire death benefit, and any person partially dependent shall receive no part thereof.”

Section 4903 of the Labor Code of the State of California provides in part as follows, to wit:

“The commission may determine, and allow as a lien against any amount to be paid as compensation:

“(a) Attorney’s Fee and Disbursements. A reasonable attorney’s fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts, and the reasonable disbursements in connection therewith.

\* \* \*

“(d) Burial Expenses. The reasonable burial expenses of the deceased employee, not to exceed the amount provided for by Section 4701.”

Section 4905 of the Labor Code of the State of California provides as follows, to wit:

“Where it appears in any proceeding pending before the commission that a lien should be allowed if it had been duly requested by the party entitled thereto, the commission may, without any request for such lien having been made, order the payment of the claim to be

made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of the award."

Section 5300 of the Labor Code of the State of California provides as follows, to wit:

"All the following proceedings shall be instituted before the commission and not elsewhere, except as otherwise provided in Divisions IV and V.

"(a) For the recovery of compensation, or concerning any right of liability arising out of or incidental thereto.

"(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

"(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

"(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this division.

"(e) For obtaining any order which by Divisions IV and V the commission is authorized to make.

"(f) For the determination of any other

matter, jurisdiction over which is vested by Divisions IV and V in the commission."

Section 5301 of the Labor Code of the State of California provides as follows, to wit:

"The commission is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in section 5300 subject only to the review by the courts as specified in this division. Such jurisdiction may be exercised by the commission through either of its panels as described in Section 115 or, subject to the approval by the panel of the order, decision, or award, through a commissioner or referee."

Section 5302 of the Labor Code of the State of California provides as follows, to wit:

"All orders, rules, findings, decisions, and awards of the commission shall be prima facie lawful and conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts within the time and in the manner specified in this division."

Section 5303 of the Labor Code of the State of California provides as follows, to wit:

"There is but one cause of action for each injury coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion



of the commission, be joined in the same proceeding at any time.”

Section 5307.5 of the Labor Code of the State of California provides as follows, to wit:

“The commission or a panel, a commissioner, or a referee may: \* \* \* Provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, employee, dependent, creditor, or otherwise.”

Section 5800 of the Labor Code of the State of California provides as follows, to wit:

“After final hearing by the commission, it shall, within thirty days, make and file:

“(a) Its findings upon all facts involved in the controversy.

“(b) Its order, decision, or award stating its determination as to the rights of the parties. All awards of the commission either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil action on all due and unpaid payments from the date of the making and filing of said award. Such interest shall run from the date of making and filing of an award, as to amounts which by the terms of the award are payable forthwith. As to amounts which under the terms of the award subsequently become due in installments or otherwise, such interest shall run from the date when each such amount becomes due and payable.”

Section 5801 of the Labor Code of the State of California provides as follows, to wit:

“The commission in its award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or may fix and determine the weekly disability payment to be made and order payment thereof during the continuance of disability.”

Section 3753 of the Labor Code of the State of California provides as follows, to wit:

“The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation.”

## IX.

The said James Buie left surviving him a lawful widow, Norma Buie, a citizen and resident of the State of California, the said Norma Buie being dependent upon the said James Buie for her support, and being the sole lawful dependent of the said James Buie at the time of his, the said James Buie's death.

## X.

That the said Quaker Pacific Rubber Company, employer of the said James Buie, as aforesaid, was,

and the said James Buie also was, subject to the provisions of the Workmen's Compensation Laws of the State of California at and before the time of the injury and death of the said James Buie as hereinabove described; and the said Quaker Pacific Rubber Company did, prior to the accident between the said James Buie and the defendants' agent, Lucius W. Hereford, as hereinabove more particularly described, enter into a contract of insurance with the plaintiff Maryland Casualty Company, the said contract being commonly termed a "Standard Workmen's Compensation and Employer's Liability Policy." This said contract and policy of insurance was in full force and effect during all times mentioned herein, and under and by its terms and provisions the said Maryland Casualty Company did undertake to insure the said Quaker Pacific Rubber Company against liability for workmen's compensation claims and awards.

## XI.

That the said Norma Buie, widow of the deceased James Buie, applied for and claimed compensation and death benefits on account of the death as aforesaid of the said James Buie, in proceedings instituted and maintained by her before the Industrial Accident Commission of the State of California; that the said proceedings were named and designated as follows, to wit:

Claim Number 112-327; Norma Buie, Applicant, vs. James T. Moore, doing business under the firm name and style of Quaker Pa-



cific Rubber Company and Maryland Casualty Company, Defendants.

That the said Industrial Accident Commission of the State of California had jurisdiction to receive, adjudicate and decide upon the said claim and application of the said Norma Buie; and that a hearing and determination was had thereupon; and that the said Industrial Accident Commission of the State of California did, on or about the 3rd day of November, 1948, make and enter the following award in compliance with law, to wit:

“Award Is Made in favor of Norma Buie against Maryland Casualty Company of a death benefit in the total sum of \$6,000.00, payable at the rate of \$28.50 weekly, beginning October 3, 1947, and continuing weekly thereafter until the whole of the award shall have been paid, less credit for any payments made on account thereof, and less the sum of \$400.00, together with any prosecution expenses incurred and paid, to John H. Black and Henry Schaldach, as attorneys’ fee.

“It Is Ordered that jurisdiction be, and it is, hereby reserved to fix the reasonable value of medical expense, if any, incurred to relieve deceased of the effects of his injury herein.

“It Is Further Ordered that jurisdiction be, and it is, hereby reserved to award the statutory burial expense upon petition first filed therefor by interested parties.

“It Is Further Ordered that this Award shall

carry interest pursuant to the provisions of Section 5800 (b) of the Labor Code.”

## XII.

That thereafter, on the 24th day of November, 1948, the said Industrial Accident Commission did, in proceedings upon the same matter, award unto the said Norma Buie the further sum of \$300.00, the same being an award for expenses of the burial of the said James Buie.

## XIII.

That by virtue of the awards made unto the said Norma Buie, by the said Industrial Accident Commission of the State of California, on account of the death of the said James Buie, all as aforesaid, the plaintiff Maryland Casualty Company has become obligated to pay, and has in part paid, the total sum of \$6,300.00, which sum is the total of the awards of compensation made by the said Industrial Accident Commission of the State of California.

## XIV.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, enacted by the Legislature of the said State and duly approved by the Governor thereof:

Section 3204 of the Labor Code of the State of California provides as follows, to wit:

“Unless the context otherwise requires, the definitions hereinafter set forth in this chapter

shall govern the construction and meaning of the terms and phrases used in this division.”

Section 3209 of the Labor Code of the State of California provides as follows, to wit:

“ ‘Damages’ means the recovery allowed in an action at law as contrasted with compensation.”

Section 3210 of the Labor Code of the State of California provides as follows, to wit:

“ ‘Person’ includes an individual, firm, voluntary association, or a public, quasi public, or private corporation.”

Section 3850 of the Labor Code of the State of California provides as follows, to wit:

“As used in this chapter:

“(a) ‘Employee’ includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.

“(b) ‘Employer’ includes insurer as defined in this division.”

Section 3851 of the Labor Code of the State of California provides as follows, to wit:

“The death of the employee or of any other person, does not abate any right of action established by this chapter.”

Section 3852 of the Labor Code of the State of California provides as follows, to wit:

“The claim of an employee for compensation does not affect his claim or right of action for

all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.”

Section 3853 of the Labor Code of the State of California provides as follows, to wit:

“If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently.”

Section 3854 of the Labor Code of the State of California provides in part as follows, to wit:

“If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee

is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, \* \* \* the employer shall pay any excess to the injured employee or other person entitled thereto."

Section 3855 of the Labor Code of the State of California provides as follows, to wit:

"If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages."

Section 3857 of the Labor Code of the State of California provides as follows, to wit:

"The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order."

## XV.

That as a proximate result of the injury and death of the said James Buie, and as a proximate



result of the negligence of the defendants acting by and through their agent, Lucius W. Hereford, as aforesaid, the plaintiff Maryland Casualty Company, has been damaged by the defendants in the sum of \$6,300.00, this sum being the amount of compensation which the plaintiff is obligated to pay, and has in part paid, to the said Norma Buie, widow of the said James Buie, on account of the injuries and death negligently inflicted upon the said James Buie by the defendants' agent and employee, the said Lucius W. Hereford.

Wherefore, plaintiff demands judgment against the defendants, and each of them, in the sum of \$6,300.00, and for its costs and disbursements incurred herein.

CAKE, JAUREGUY & TOOZE,  
/s/ DWIGHT L. SCHWAB,  
/s/ DENTON G. BURDICK, JR.,  
/s/ LAMAR TOOZE, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 3, 1950.

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[Title of District Court and Cause.]

### MOTION FOR SUMMARY JUDGMENT

Come Now the defendants and move this Court for a summary judgment in their favor as to all of the complaint and action, and that said action be

dismissed with costs and disbursements. This motion is made pursuant to Rule 56 (b), Federal Rules of Civil Procedure.

The defendants will contend that the action is barred by Section 8-903, Oregon Compiled Laws Annotated, and that it affirmatively appears from the complaint that whatever cause of action exists herein accrued on the 2nd day of October, 1947, and that the Statute creating the right of action provides that the action must be commenced within two years. Further, that it affirmatively appears that this action was not commenced until May 25, 1950.

/s/ L. A. RECKEN,  
SENN, RECKEN & RECKEN,  
Attorneys for Defendants.

I, L. A. Recken, one of the attorneys for the defendants herein, do hereby certify that I make the foregoing motion for summary judgment, that said motion is, in my opinion, well founded in law and is made in good faith and not made for purposes of delay herein.

/s/ L. A. RECKEN.

State of Oregon,  
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of motion and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

That the said motion, in my opinion, is well founded in law.

Dated July 6, 1950.

/s/ L. A. RECKEN,

Of Attorneys for Defendants.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this . . . . day of July, 1950.

/s/ DENTON G. BURDICK, JR.,

Of Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1950.

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Come Now the defendants, by L. A. Recken and Senn, Recken & Recken, Attorneys at Law, and move the Court to dismiss the above-entitled action pursuant to Rule 12 (b) (6), Federal Rules of Civil Procedure, because the complaint fails to state a claim against the defendants upon which relief can be granted.

/s/ L. A. RECKEN,

SENN, RECKEN & RECKEN,

Attorneys for Defendants.



## Points and Authorities Relief Upon by Defendants

It affirmatively appears from the complaint in this cause that the action is based on negligence by reason of the death of one James Buie. That said death is alleged to have occurred by reason of the tortious acts of one Lucius W. Hereford. That said death occurred in Columbia County, Oregon, on the 2nd day of October, 1947. That the Statute of Limitations in the State of Oregon, to wit: Section 8-903, Oregon Compiled Laws Annotated, provides that said action shall be commenced within two years from the date of the death, and the right to bring said action expired on the 3rd day of October, 1949. That said action above was commenced on the 25th day of May, 1950, in this Court.

I, L. A. Recken, one of the attorneys for the defendants herein, do hereby certify that I make the foregoing motion to dismiss, that said motion is, in my opinion, well founded in law and is made in good faith and not made for purposes of delay herein.

/s/ L. A. RECKEN.

Receipt of copy acknowledged.

[Endorsed]: Filed July 10, 1950.

[Title of District Court and Cause.]

### PRE-TRIAL ORDER

This Matter came on for hearing before the Honorable James Alger Fee, Chief Judge of this Court, presiding; plaintiff appearing by one of its attorneys, Denton G. Burdick, Jr., and defendants appearing by one of their attorneys, L. A. Recken; the said hearing being conducted upon defendants' motion for summary judgment and defendants' motion to dismiss; and

It appearing to the Court that the defendants' motion for summary judgment is based on the assertion that plaintiff's action is barred by Section 8-903, O.C.L.A.; and

It appearing to the Court that the defendants' motion to dismiss is based upon the assertion that the plaintiff's complaint fails to state a claim upon which relief can be granted; and

It appearing to the Court that the issues raised by the defendants' motions as aforesaid should be resolved on the basis of an agreed statement of the facts of this action relating to those issues, prior to the trial of this case upon the factual question whether the conduct of the defendants through their agent was negligent or culpable,

The Court ordered that a pre-trial order be drawn reciting the admitted facts upon which the defendants' said motions can be decided; and that the legal issues involved therein be expressed.

Pursuant to the order of the Court, it is agreed,

admitted and represented by the litigants that the following are:

## Agreed Statement of Facts

### I.

At all times herein mentioned plaintiff was and now is a Maryland corporation legally doing an insurance business in California and Oregon, and was and now is legally authorized to write workmen's compensation insurance in the State of California.

### II.

That James Buie was employed by James T. Moore, doing business as the Quaker Pacific Rubber Company, under a contract of employment wherein the said James Buie was employed and, at the time of the accident herein involved, was working as a travelling salesman operating within the State of Oregon.

### III.

That the said James Buie was a resident and inhabitant of the State of Oregon, living in the City of Portland, Oregon, and his duties and employment were solely within the State of Oregon.

### IV.

That the defendants, Sidney F. Paton and Lois Eleanor Paton, were residents and citizens of the State of California and are co-partners doing business under the name and style of Paramount Serv-

ice, and that the said defendants did employ within the State of Oregon a certain employee named Lucius W. Hereford whose work and employment consisted of operating a 1942 G.M.C. motor truck bearing 1947 Oregon license plate No. T-3937. That the said Lucius W. Hereford's duties and employment were solely in the State of Oregon, and at all times herein mentioned the said Hereford acted in the course and scope of his employment and as agent for the defendants.

#### V.

That the said James Buie in the course and scope of his employment did own and operate his Buick automobile which was licensed under the laws of the State of Oregon.

#### VI.

That the Lower Columbia River Highway is a public highway in Columbia County, Oregon.

#### VII.

That on October 2, 1947, James Buie in the course and scope of his employment was driving his Buick automobile in a westerly direction on and along the Lower Columbia River Highway, and at a point about four miles northwesterly of the town of Rainier in Columbia County, Oregon, a collision occurred between the truck of the defendants above described and which was driven by Lucius W. Hereford and the automobile of the said James

Buie; and as a result of which collision the said James Buie died on the 2nd day of October, 1947.

### VIII.

That thereafter Norma Buie, a citizen and resident of the State of California and the lawful widow of James Buie and claiming to be dependent upon the said James Buie, made claim under the provisions of the Workmen's Compensation Laws of the State of California. That the said James T. Moore, doing business as the Quaker Pacific Rubber Company, employer of the said James Buie, was subject to the provisions of the Workmen's Compensation Laws of the State of California. That the said Maryland Casualty Company, the plaintiff, had previous to the 2nd day of October, 1947, entered into an insurance contract with the said James T. Moore, doing business as the Quaker Pacific Rubber Company, and under which contract the Maryland Casualty Company undertook to insure the said James T. Moore, doing business as The Quaker Pacific Rubber Company, against liability for Workmen's Compensation claims and awards, which contract was in full force and effect during all the times herein mentioned.

### IX.

That the Industrial Accident Commission of the State of California did, between the 2nd day of November, 1948, and the 25th day of November, 1949, make and enter an award under the Compensation Law of the State of California wherein the



said Industrial Accident Commission of California awarded Norma Buie the sum of Six Thousand Dollars (\$6,000), together with the sum of Three Hundred Dollars (\$300), as the funeral expense.

### X.

That the said Maryland Casualty Company under its policy has become obligated and liable to pay and has in part paid the sum of Six Thousand Three Hundred Dollars (\$6,300) as aforesaid.

### XI.

That the recital of California statutes set forth in "Appendix A," appended hereto and by this reference made a part hereof, are correct transcriptions of valid and effective statutory laws of the State of California which were in full force and effect during all of the times herein mentioned.

### XII.

On June 14, 1950, forthwith after the commencement of this civil action, the plaintiff served written notice by registered mail on Norma Buie, widow of James Buie, of this action and of the name of the court in which this action is brought, and proof of such service has been filed in this action. The said Norma Buie has not replied to said notice or made any response thereto known to the plaintiff.

Questions of Law to Be Decided by the Court

### I.

Does the substantive statutory and decisional law of California or of Oregon govern the existence,

nature and incidents of the present action between these parties?

II.

Does Sec. 8-903, O.C.L.A., being one of the Statutes of Limitation of Oregon, apply to and bar the maintenance of the present action?

III.

Does Sec. 1-204, O.C.L.A., being one of the Oregon Statutes of Limitation, apply to and permit the maintenance of the present action?

IV.

Do either Sec. 340 of the California Code of Civil Procedure or Sec. 338 of the California Code of Civil Procedure, bring Statutes of Limitation of California recited in said "appendix A" hereto, apply to and govern the maintenance of the present action?

Based upon said pre-trial hearing,

It Is Hereby Ordered, Considered and Adjudged, that this pre-trial order shall govern the proceedings in connection with the defendants' motion for dismissal and for summary judgment. In the event that defendants' motions are overruled a further pre-trial conference will be held to formulate the issue as to the negligence or culpability of the defendants.

Dated this 26th day of March, 1951.

/s/ GUS J. SOLOMON,  
U. S. District Judge.

Approved:

/s/ DENTON G. BURDICK, JR.,  
Of Attorneys for Plaintiff.

/s/ L. A. RECKEN,  
Of Attorneys for Defendant.

## Appendix "A"

### I.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, enacted by the Legislature of said State and duly approved by the Governor thereof:

Section 111 of the Labor Code of the State of California provided in part, prior to September 19, 1947, as follows, to wit:

"The Division of Industrial Accidents shall be under the control of and governed by the Industrial Accident Commission consisting of 7 members."

Said Section 111, from and after September 19, 1947, provided in part as follows, to wit:

"The Industrial Accident Commission, consisting of seven members shall exercise all judicial powers, including those vested in it under Sections 4903, 5301, and 5307 of this code."

Section 114 of the Labor Code of the State of California provided as follows, to wit:

"The commission shall be composed of two



panels of three members each. The members shall be assigned to the panels by the chairman and may be transferred from one panel to another by the chairman to facilitate the work of the commission. The chairman may act in the place of any member of a panel who is absent, or whose office has become vacant.

\* \* \*

“Except as otherwise expressly provided, each of the panels shall have the power to hear and determine matters within the jurisdiction of the commission. The commission shall by rule provide for a geographical division of the State to determine what matters are to be heard and decided by each panel. Particular matters may be transferred from one panel to another, or to the commission as a whole, by an order signed by four members of the commission. In any case in which the commission acts as a whole, the act of four members shall be considered the act of the commission.”

Section 133 of the Labor Code of the State of California provided as follows, to wit:

“The commission shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code.”

Section 3204 of the Labor Code of the State of California provided as follows, to wit:

“Unless the context otherwise requires, the definitions hereinafter set forth in this chapter

shall govern the construction and meaning of the terms and phrases used in this division."

Section 3211 of the Labor Code of the State of California, being part of same Chapter and division as aforesaid Section 3204, provided as follows, to wit:

"'Insurer' includes the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or inter-insurance exchange authorized under the laws of this State to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued."

Section 3501 of the Labor Code of the State of California provided in part as follows, to wit:

"The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she was living at the time of his injury, or for whose support such husband was legally liable at the time of his injury."

Section 3600 of the Labor Code of the State of California provided as follows, to wit:

"Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of

and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

“(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

“(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

“(c) Where the injury is proximately caused by the employment, either with or without negligence.

“(d) Where the injury is not caused by the intoxication of the injured employee.

“(e) Where the injury is not intentionally self-inflicted.”

Section 3700 of the Labor Code of the State of California provided in part as follows, to wit:

“Every employer except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways:

“(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this State.”

Section 4701 of the Labor Code of the State of California provided as follows, to wit:

“Where an injury causes death, either with

or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for:

“(a) Reasonable expenses of the employee’s burial, not exceeding three hundred dollars (\$300).

“(b) A death benefit, to be allowed to the dependents when the employee leaves any person dependent upon him for support.”

Section 4702 of the Labor Code of the State of California provided in part as follows, to wit:

“The death benefit shall be a sum sufficient to equal:

“(a) In a case of total dependency, four times the average annual earnings of the deceased employee.

\* \* \*

“The death benefit shall be paid in installments in the same manner and amounts as disability indemnity, payments to be made at least twice each calendar month unless the commission otherwise orders. Except as provided in the next paragraph the death benefit, when added to all accrued disability indemnity, shall not exceed four times the average annual earnings of the employee, nor exceed the sum of six thousand dollars (\$6,000) except in the case of a surviving widow with one or more dependent minor children, in which case the death benefit shall not exceed seven thousand five hundred dollars (\$7,500) and except as otherwise provided in Sections 4553 and 4554. For a total

dependency the minimum death benefit shall be three thousand dollars (\$3,000).”

Section 4703 of the Labor Code of the State of California provided in part as follows, to wit:

“Subject to the provisions of section 4704, this section shall determine the right to a death benefit.

“If there is any person wholly dependent for support upon a deceased employee, such person shall receive the entire death benefit, and any person partially dependent shall receive no part thereof.”

Section 4903 of the Labor Code of the State of California provided in part as follows, to wit:

“The commission may determine, and allow as a lien against any amount to be paid as compensation:

“(a) Attorney’s Fee and Disbursements. A reasonable attorney’s fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts, and the reasonable disbursements in connection therewith.

\* \* \*

“(d) Burial Expenses. The reasonable burial expenses of the deceased employee, not to exceed the amount provided for by Section 4701.”

Section 4905 of the Labor Code of the State of California provided as follows, to wit:

“Where it appears in any proceeding pend-



ing before the commission that a lien should be allowed if it had been duly requested by the party entitled thereto, the commission may, without any request for such lien having been made, order the payment of the claim to be made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of the award.”

Section 5300 of the Labor Code of the State of California provided as follows, to wit:

“All the following proceedings shall be instituted before the commission and not elsewhere, except as otherwise provided in Divisions IV and V.

“(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

“(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division in favor of the injured employee, his dependents, or any third person.

“(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

“(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any



benefit under the compensation provisions of this division.

“(e) For obtaining any order which by Divisions IV and V the commission is authorized to make.

“(f) For the determination of any other matter, jurisdiction over which is vested by Divisions IV and V in the commission.”

Section 5301 of the Labor Code of the State of California provided as follows, to wit:

“The commission is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in section 5300 subject only to the review by the courts as specified in this division. Such jurisdiction may be exercised by the commission through either of its panels as described in Section 115 or, subject to the approval by the panel of the order, decision, or award, through a commissioner or referee.”

Section 5302 of the Labor Code of the State of California provided as follows, to wit:

“All orders, rules, findings, decisions, and awards of the commission shall be prima facie lawful and conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts within the time and in the manner specified in this division.”

Section 5303 of the Labor Code of the State of California provided as follows, to wit:

“There is but one cause of action for each injury\* coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such injury may, in the discretion of the commission, be joined in the same proceeding at any time.”

Section 5307.5 of the Labor Code of the State of California provided in part as follows, to wit:

“The commission or a panel, a commissioner, or a referee may: \* \* \* Provide for the joinder in the same proceeding of all persons interested therein; whether as employer, insurer, employee, dependent, creditor, or otherwise.”

Section 5800 of the Labor Code of the State of California provided as follows, to wit:

“After final hearing by the commission, it shall, within thirty days, make and file:

“(a) Its findings upon all facts involved in the controversy.

“(b) Its order, decision, or award stating its determination as to the rights of the parties. All awards of the commission either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil action on all due and unpaid payments from the date of the

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\*Laws 1947, Ch. 1034, effective September 19, 1947. (Prior to September 19, 1947, “injury” read “transaction.”)

making and filing of said award. Such interest shall run from the date of making and filing of an award, as to amounts which by the terms of the award are payable forthwith. As to amounts which under the terms of the award subsequently become due in installments or otherwise, such interest shall run from the date when each such amount becomes due and payable.”

Section 5801 of the Labor Code of the State of California provided as follows, to wit:

“The commission in its award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or may fix and determine the weekly disability payment to be made and order payment thereof during the continuance of disability.”

Section 3753 of the Labor Code of the State of California provided as follows, to wit:

“The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation.”

## II.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, all being Part 1 of Division IV of the Labor Code of California, enacted by the Legislature of the said State and duly approved by the Governor thereof:

Section 3204, Chapter 1, Part 1, Division IV, of the Labor Code of the State of California, provided as follows, to wit:

“Unless the context otherwise requires, the definitions hereinafter set forth in this chapter shall govern the construction and meaning of the terms and phrases used in this division.”

Section 3209, Chapter 1, Part 1, Division IV, of the Labor Code of the State of California, provided as follows, to wit:

“‘Damages’ means the recovery allowed in an action at law as contrasted with compensation.”

Section 3210, Chapter 1, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“‘Person’ includes an individual, firm, voluntary association, or a public, quasi public, or private corporation.”

Section 3850, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“As used in this chapter:

“(a) ‘Employee’ includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.

“(b) ‘Employer’ includes insurer as defined in this division.”

Section 3851, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“The death of the employee or of any other person, does not abate any right of action established by this chapter.”

Section 3852, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.”

Section 3853, Chapter 5, Part 1, Division IV, of



the Labor Code of the State of California provided as follows, to wit:

“If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action, if brought independently.”

Section 3854, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided in part as follows, to wit:

“If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, \* \* \* the employer shall pay any excess to the injured employee or other person entitled thereto.”

Section 3855, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“If the employee joins in or prosecutes such



action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages.”

Section 3855, Chapter 5, Part 1, Division IV, of the Labor Code of the State of California provided as follows, to wit:

“The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order.”

### III.

That at all times mentioned herein, there were in full force and effect within the State of California the following statutes, all being in Part II, Title II, of the Code of Civil Procedure of California, enacted by the Legislature of the said State and duly approved by the Governor thereof:

Section 312, Part II, Title II, Chapter 1, of the Code of Civil Procedure of the State of California provided as follows, to wit:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have

accrued, unless where, in special cases, a different limitation is prescribed by statute.”

Section 335, Part II, Title II, Chapter 3, of the Code of Civil Procedure of the State of California provided as follows, to wit:

“The periods proscribed for the commencement of actions other than for the recovery of real property, are as follows:”

Section 338, Part II, Title II, Chapter 3, of the Code of Civil Procedure of the State of California provided in part as follows, to wit:

“Within three years:

“1. An action upon a liability created by statute, other than a penalty or forfeiture.”

Section 340, Part II, Title II, Chapter 3, of the Code of Civil Procedure of the State of California provided in part as follows, to wit:

“Within one year.

\* \* \*

“3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized indorsement;”

[Endorsed]: Filed March 26, 1951.

In the District Court of the United States  
for the District of Oregon

Civil No. 5419

MARYLAND CASUALTY COMPANY, a  
Corporation,

Plaintiff,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Defendants.

### JUDGMENT ORDER

Defendants filed a Motion for Summary Judgment and a Motion to Dismiss; thereafter, a Pre-trial Order, in which the parties agreed to all of the facts necessary for a determination of such motions, was entered. The Court, on the basis of such agreed facts, finds that the defendants' motions should be allowed.

It Is Ordered and Adjudged that the action be and the same is hereby dismissed and that judgment in favor of the defendants be entered.

Dated this 29th day of March, 1951.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, defendants, and Messrs. L. A. Recken and Senn, Recken & Recken, defendants' attorneys:

Notice is hereby given that Maryland Casualty Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of March, 1951, dismissing the action of the plaintiff and entering judgment in favor of the defendants.

/s/ DENTON G. BURDICK, JR.,

/s/ LAMAR TOOZE, JR.,

CAKE, JAUREGUY & TOOZE,

Attorneys for Appellant.

[Endorsed]: Filed April 26, 1951.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents, that we Maryland Casualty Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a Maryland corporation, as surety, are held and firmly bound unto Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, defendants in the full and just sum of Two

Hundred Fifty and no/100 (\$250.00) Dollars to be paid to the said Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, their attorneys, executors or administrators; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of April, 1951:

Whereas, lately in the District Court of the United States for the District of Oregon in an action pending in said Court, between Maryland Casualty Company, a corporation, plaintiff, and Sidney F. Paton and Lois Eleanor Paton, defendants, doing business as Paramount Service, a judgment was rendered against the said plaintiff and the said plaintiff having filed in said Court a Notice of Appeal to reverse the judgment in said action on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be holden at San Francisco, in the State of California, or at such other proper place as the Court may see fit to hold said session.

Now, the condition of the above obligation is such, that if the said Maryland Casualty Company, a corporation, shall pay the costs if the appeal is dismissed or the said judgment affirmed, or such costs as the said Court of Appeals may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

[Seal]

MARYLAND CASUALTY  
COMPANY,

By /s/ [Indistinguishable],  
Attorney in Fact, Principal.

[Seal] UNITED STATES FIDELITY  
AND GUARANTY CO.,

By /s/ KARL H. DOERRE,  
Attorney in Fact, Surety.

Countersigned:

/s/ [Indistinguishable],  
Resident Agent.

[Endorsed]: Filed April 26, 1951.

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[Title of District Court and Cause.]

### PLAINTIFF'S STATEMENT OF POINTS

The plaintiff-appellant intends to rely on the following mentioned points in its appeal from the judgment of the District Court dismissing its action:

1. The Court erred in holding that the plaintiff's complaint did not state a claim upon which relief could be granted.

2. Based upon the agreed facts contained in the pre-trial order, the Court erred in dismissing plaintiff's action.

3. Based upon the agreed facts contained in the pre-trial order, the Court erred in granting a summary judgment of dismissal.



4. Based upon the agreed facts contained in the pre-trial order, the Court erred in holding that plaintiff could not maintain a civil action based upon the laws of the State of California set forth in the pre-trial order.

5. Based upon the agreed facts contained in the pre-trial order, the Court erred in holding that Section 8-903, Oregon Compiled Laws Annotated, prevented the maintenance of this civil action by plaintiff.

6. Based upon the agreed facts contained in the pre-trial order, the Court should have overruled defendant's motion for summary judgment and motion to dismiss and should have allowed the action to proceed to issue and trial on the question of whether the defendants wrongfully caused the death of James Buie.

/s/ DENTON G. BURDICK, JR.,

/s/ LAMAR TOOZE, JR.,

CAKE, JAUREGUY & TOOZE,

Attorneys for Plaintiff-

Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

STIPULATION AS TO DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

It Is Hereby Stipulated and Agreed between the parties to the above-entitled action that the following designated parts of the record, proceedings and evidence shall be included in the record on appeal:

1. Complaint.
2. Motion for Summary Judgment.
3. Motion to Dismiss.
4. Pre-Trial Order.
5. Judgment.
6. Notice of Appeal.
7. Bond on Appeal.
8. Plaintiff's Statement of Points.

Dated at Portland, Oregon, this 2nd day of May, 1951.

/s/ DENTON G. BURDICK, JR.,  
Of Attorneys for Plaintiff.

/s/ L. A. RECKEN,  
Of Attorneys for Defendants.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1950

- May 3—Filed complaint.
- May 3—Issued summons to marshal.
- May 5—Filed summons with returns.
- May 24—Filed motion for issuance of summons for service on Secty of State and for order appointing person to make service.
- May 24—Filed brief in support of motion.
- May 25—Filed and entered order for issuance of summons for service on Secty of State, fixing time for appearance and designating B. R. Smith to make service. Fee.
- May 25—Mailed summons for service on Sec. of State to B. R. Smith, Salem, Ore.
- June 12—Filed affidavit and proof of service.
- June 12—Filed affidavit of mailing notice and summons.
- June 21—Filed motion of defts for extension of time.
- June 21—Filed stipulation for extension of time.
- June 21—Filed and entered order allowing defts until July 20 to plead. Fee.
- June 28—Filed affidavit of notice to surviving widow of employee.
- July 10—Filed defendants' motion for summary judgment.
- July 10—Filed defendants' motion to dismiss action.
- July 24—Record of hearing on defts' motion for

1950

summary judgment and motion for dismissal; argued and order entered to draw pre-trial order setting up legal questions. Fee.

Oct. 30—Record of pre-trial conference—briefs to be filed 10 days for pltf—10 days for deft and 10 days to reply. S.

Nov. 21—Filed defendants' brief.

Dec. 1—Filed plaintiff's answering brief on motion to dismiss and motion for summary judgment.

Dec. 11—Filed and entered order extending time to file brief. S.

Dec. 13—Filed defendants' reply brief.

1951

Mar. 26—Filed and entered pre-trial order. S.

Mar. 26—Record of oral opinion.

Mar. 29—Filed and entered judgment of dismissal. S.

Apr. 26—Filed notice of appeal by plntf.

Apr. 26—Filed bond on appeal.

Apr. 26—Copy notice of appeal to Senn and Recken.

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### CLERK'S CERTIFICATE

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of

Complaint, Motion for summary judgment, Motion to dismiss, Pre-trial order, Judgment, Notice of appeal, bond on appeal, Statement of points, Designation of record on appeal, and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5419, in which the Maryland Casualty Company, a corporation, is Plaintiff and Appellant, and Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, are Defendants and Appellees; that the said record has been prepared by me in accordance with the designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of May, 1951.

[Seal]    LOWELL MUNDORFF,  
                  Clerk.

By /s/ F. L. BUCK,  
                  Chief Deputy.

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[Endorsed]: No. 12937. United States Court of Appeals for the Ninth Circuit. Maryland Casualty Company, a corporation, Appellant, vs. Sidney F. Paton and Lois Eleanor Paton, doing business as Paramount Service, Appellees. Transcript of Rec-

ord. Appeal from the United States District Court  
for the District of Oregon.

Filed May 17, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

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In the United States Court of Appeals for the  
Ninth Circuit

No. 12937

MARYLAND CASUALTY COMPANY, a Corpo-  
ration,

Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR  
PATON, Doing Business as PARAMOUNT  
SERVICE,

Appellees.

STIPULATION DESIGNATING PORTION OF  
RECORD TO BE PRINTED AND ADOPT-  
TION BY APPELLANT OF STATEMENT  
OF POINTS FILED IN TRIAL COURT

It is hereby Stipulated and Agreed by and be-  
tween the appellant by Denton G. Burdick, Jr., one  
of its attorneys, and the appellees by L. A. Recken,  
one of their attorneys, that the entire record on



appeal in the above matter is designated to be printed.

It is further Stipulated and Agreed that the appellant on this appeal is relying upon the Statement of Points heretofore filed in this cause with the District Court of the United States for the District of Oregon which Statement of Points is hereby formally adopted by appellant as being the concise statement of the points upon which appellant intends to rely on this appeal.

Dated at Portland, Oregon, this 15th day of May, 1951.

/s/ DENTON G. BURDICK, JR.,  
Of Attorneys for Appellant.

/s/ L. A. RECKEN,  
Of Attorneys for Appellee.

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